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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

DONTE D. LOVE,

Defendant and Appellant.

B214190

(Los Angeles County  
Super. Ct. No. NA078349)

APPEAL from the judgment of the Superior Court of Los Angeles County.  
Jesse I. Rodriguez, Judge. Affirmed.

Lise M. Breakey, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

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## SUMMARY

Defendant Donte Deon Love was convicted by jury of two counts of assault with a firearm in violation of Penal Code section 245, subdivision (a)(2), and one count of possession of a firearm by a felon in violation of Penal Code section 12021, subdivision (a)(1). Defendant admitted four prior convictions for serious felonies and was sentenced to 80 years to life in prison. Defendant raises two issues on appeal. First, defendant contends that the trial court should have granted his *Batson-Wheeler* motion during voir dire. Second, defendant argues that the court should have exercised its discretion to strike one or more of his prior “strike” convictions. We find no merit in defendant’s contentions and affirm the judgment.

## BACKGROUND

The prosecutor used her first peremptory challenge to dismiss the only African-American juror (Juror No. 9) present in the initial panel of 18 jurors. Juror No. 9 had had a previous negative encounter with the police involving mistaken identity. During this encounter, the officers, equipped with shotguns, ordered Juror No. 9 out of his vehicle and made him lie face down on the pavement.

Defense counsel objected to the prosecutor’s peremptory challenge, stating that defendant was Black and Juror No. 9 was the only Black individual of the 18 people seated in the jury box. The trial court ruled that defense counsel failed to establish a prima facie case of invidious discrimination based on these facts.

Later in the voir dire, two other jurors in the panel admitted to having negative experiences with police officers. Juror No. 2, a truck driver, had been pulled over and given a ticket, which put a point and a half on his driver’s license. Juror No. 6 had witnessed her friend being arrested and physically abused in the back of a police car. Though neither Juror No. 2 nor Juror No. 6 was removed from the panel immediately, they were both eventually excused, by defense counsel and the prosecutor respectively.

After his conviction by the jury, defendant admitted he had suffered four serious or violent prior felony convictions within the meaning of Penal Code section 667, subdivisions (a)(1) and (b) through (i) (the Three Strikes law). Those convictions,

resulting from a single prosecution in 1992, were for attempted murder with personal use of a firearm, possession of a firearm by a felon, evasion of a police officer with willful and wanton disregard for safety of persons or property, and discharging a firearm at an unoccupied vehicle, and all four convictions included a criminal street gang enhancement. (Pen Code, § 186.22.) All of these convictions are serious felonies under the Three Strikes law, the last three by way of the gang enhancement provisions of the Penal Code. (See *id.*, §§ 667, subd. (d)(1); 1192.7, subd. (c)(9) [attempted murder]; 1192.7, subd. (c)(28) [“any felony offense, which would also constitute a felony violation of Section 186.22,” the statute governing enhanced punishment for felonies committed for the benefit of a criminal street gang].)

Defendant was sentenced to state prison for a total of 80 years to life, consisting of (1) 25 years to life on the base count (Pen. Code, § 245, subd. (a)(2), assault with a firearm on the first victim) plus 10 years consecutive for personal use of a firearm (*id.*, § 12022.5, subds. (a) & (d)),<sup>1</sup> plus five years consecutive under Penal Code section 667, subdivision (a)(1),<sup>2</sup> for a total of 40 years; and (2) the same sentence, to run consecutively, on the other count of assault with a firearm (on the second victim). Defendant was also sentenced to a term of 25 years to life, to run concurrently, on the charge of being a convicted felon in possession of a firearm.

Defendant filed this timely appeal.

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<sup>1</sup> Penal Code section 12022.5, subdivision (a), requires a consecutive term of imprisonment for 3, 4, or 10 years for personal use of a firearm in the commission of a felony (unless use of a firearm is an element of the offense), and subdivision (d) requires imposition of the additional term for any violation of Penal Code section 245 if a firearm is used (notwithstanding the limitation relating to an element of the offense).

<sup>2</sup> Penal Code section 667, subdivision (a)(1), provides that “any person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.”

## DISCUSSION

### 1. Defendant's Batson-Wheeler claim

Peremptory challenges may not be used to systematically exclude jurors because of membership in a cognizable group distinguished by racial, religious, ethnic, or similar characteristics. (*People v. Wheeler* (1978) 22 Cal.3d 258, 276 (*Wheeler*); see also *Batson v. Kentucky* (1986) 476 U.S. 79, 84 (*Batson*).) The United States Supreme Court in *Batson* established a three-step inquiry to determine if peremptory challenges were used impermissibly. First, the defendant must make out a prima facie case “by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.” (*Id.* at p. 94.) Second, once the defendant has made out a prima facie case, the “burden shifts to the State to explain adequately the racial exclusion” by offering permissible race-neutral justifications for the strikes. (*Ibid.*) Third, “ ‘[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.’ ” (*Johnson v. California* (2005) 545 U.S. 162, 168.) The ultimate burden of persuasion remains on the party alleging systematic exclusion. (*Batson, supra*, 476 U.S. at p. 93.)

A prima facie case is established when a defendant demonstrates two elements. First, a party must show that the persons excluded are members of a cognizable group under the Equal Protection Clause or the representative cross-section rule. (*People v. Box* (2000) 23 Cal.4th 1153, 1187-1188.) Second, a party must point to circumstances supporting a reasonable inference that such persons are being challenged because of their group association, rather than because of any specific bias. (*Id.* at p. 1188.) When a trial court denies a *Batson-Wheeler* motion because it finds no prima facie case of group discrimination, the appellate court reviews the entire record of voir dire. (*Ibid.*) “ ‘If the record “suggests grounds upon which the prosecutor might have reasonably challenged” the jurors in question,’ ” the appellate court will defer to the trial judge and affirm. (*Ibid.*)

The first requirement of a prima facie case is easily met. African Americans have long been considered a cognizable group under the representative cross-section rule. (*People v. Gray* (2001) 87 Cal.App.4th 781, 788.) As for the second requirement,

defendant failed to establish a reasonable inference that Juror No. 9 was challenged because of his group association. Defendant argues that there is a basis for finding a prima facie case because the prospective juror who was challenged, like the defendant, was Black. He further contends that the failure to remove other non-Black jurors who expressed similar bias strengthens a reasonable inference of discriminatory purpose. However, both of the non-Black jurors in question were eventually removed from the panel, one by the prosecution and one by the defense. Only one peremptory challenge had been used when defendant made his *Batson-Wheeler* motion, though the prosecution and defense ultimately exhausted all of their 20 peremptory challenges. Therefore, all the court was required to (or could) consider was the voir dire of Juror No. 9.

The record indicates that Juror No. 9 had a potential bias against police officers due to a case of mistaken identity many years earlier. Though Juror No. 9 asserted that he could still “judge the right way,” there is enough evidence in the record upon which the trial judge could determine that no prima facie case was established. Juror No. 9 had been wrongfully placed in a humiliating and potentially terrifying situation by police officers. Because a reasonable explanation for excusing Juror No. 9 is apparent in the record, and because we view the trial court’s ruling on a *Batson-Wheeler* motion with “ ‘considerable deference’ ” on appeal (*People v. Howard* (1992) 1 Cal.4th 1132, 1155), we conclude that defendant’s *Batson-Wheeler* motion was properly denied.

## **2. Defendant’s sentencing claim**

Defendant argues that the trial court should have exercised its discretion to strike three of his four prior felony convictions. He points out that after his convictions in 1992, he sustained no further felony convictions until the present conviction. However, defendant was incarcerated until 2001 and was convicted for misdemeanor domestic violence in 2007. Defendant contends that the trial court abused its discretion when it failed to strike his three prior convictions that qualified as “serious felonies” only by virtue of the gang enhancement provisions of the Penal Code.

The court is entitled to strike one or more of the defendant’s prior convictions if failure to do so would not be in furtherance of justice or would be contrary to the purpose

of the Three Strikes law. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 508.) When determining whether to strike any prior convictions, a trial judge may consider the interests of society, the defendant's background, the nature of his present offenses, and any other individualized concerns. (*People v. Williams* (1998) 17 Cal.4th 148, 159 (*Williams*).) A court may not consider factors outside of the defendant and his actions, such as judicial convenience or court congestion. (*Ibid.*) The standard of review applied in a *Romero* case is whether the ruling in question "falls outside the bounds of reason" under the applicable law and all relevant facts. (*Id.* at p. 162.) The appellate court will defer to the trial court's decision unless it is clearly unreasonable. (*Ibid.*)

The Court of Appeal has found abuse of discretion when the third strike is a technical, nonviolent offense. (*People v. Cluff* (2001) 87 Cal.App.4th 991 [failing to strike a prior conviction was an abuse of discretion when the current offense was for defendant's failure to update his registration as a convicted sex offender].) However, when the present offense is violent in nature, courts have rarely found that the trial court should have struck any prior convictions.

In *Williams*, the California Supreme Court found that the trial court had abused its discretion in striking the defendant's prior serious felonies. (*Williams, supra*, 17 Cal.4th at p. 163.) Though the prior convictions were 13 years old, the defendant showed a pattern of violent behavior, including the violent misdemeanor of spousal battery. (*Ibid.*) In the present case, defendant has shown a similar pattern of violent behavior, culminating in his present conviction. This pattern of violence, coupled with the deferential standard of review, suggests that we should affirm the trial judge's decision not to strike any prior convictions.

The trial judge is tasked with looking at the totality of the circumstances, including the nature of the offenses and the time between them. Defendant's first strike (attempted murder) and his current convictions (assault with a firearm) are inherently dangerous felonies. Defendant has thus demonstrated his continued dangerousness to society and others, exactly the type of person the Three Strikes law was designed to punish. The trial judge determined from defendant's history as a repeat, dangerous offender, and status as a

recidivist, that it would not be in the interest of justice to strike any prior convictions. This court finds ample evidence in the record to support the trial judge's determination. Because the trial court's conclusion is not outside the bounds of reason, we defer to its judgment and affirm.

**DISPOSITION**

We affirm the judgment.

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GRIMES, J.

We concur:

BIGELOW, P. J.

FLIER, J.